



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BY FAX (202-639-8239) and FIRST CLASS MAIL

AUG 10 2011

Paul E. Sullivan, Esq.
Paul E. Sullivan & Associates, PLLC
601 Pennsylvania Ave. NW
Suite 900, South Building
Washington, DC 20004

RE: MURs 6289, 6362
Remembering the Brave Foundation

Dear Mr. Sullivan:

On August 18, 2010, and September 1, 2010, the Federal Election Commission notified your client, Remembering the Brave Foundation, of two complaints alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On August 2, 2011, the Commission merged MUR 6289 into MUR 6362 and found, on the basis of the information in the complaints, and information provided by you, that there is no reason to believe your client violated 2 U.S.C. § 441b(a). The Commission also considered other allegations, but was equally divided on whether to find reason to believe that your client violated 2 U.S.C. §§ 434(f) and 441d. Accordingly, the Commission closed its file in this matter.

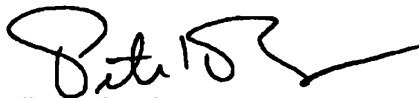
Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's no reason to believe finding, is enclosed for your information. One or more Statements of Reasons providing a basis for the Commission's decision regarding the other allegations will follow.

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Paul Sullivan, Esq.
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If you have any questions, please contact Dominique Dillenseger, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg", with a long horizontal flourish extending to the right.

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Remembering the Brave Foundation MUR: 6362

I. INTRODUCTION

This matter was generated by two complaints filed with the Federal Election Commission ("the Commission"), one by Sean Fox and another by Tal Cloud and Mike Der Maatroul, Jr., which were designated as MURs 6289 and 6362, respectively. See 2 U.S.C. § 437(g)(a)(1). The complaints concern ads broadcast by Remembering the Brave Foundation ("RB"), a section 501(c)(3) charitable organization, to promote a May 28, 2010, benefit concert in support of a program in California to create specialized license plates for families of military personnel killed on active duty. The ads featured Jeff Denham, a California State Senator and a candidate in the primary election for the 19th Congressional District in California, and were disseminated within 30 days of the California Congressional primary election on June 8, 2010. The concert was held at the Chukchansi Gold Resort & Casino.

The complaints in these two matters involve allegations that the radio and television advertisements promoting the concert were electioneering communications that were coordinated with Denham for Congress and David Bauer, in his official capacity as treasurer, ("Federal Committee") and were not disclosed to the Federal Election Commission ("the Commission"), in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"). Complainants in MUR 6362 also alleged that the advertisements were financed from funds Denham transferred from Jeff Denham for State Senate ("State Committee") to RB.

1 RB acknowledged that it paid for the advertisements and asserted that no
2 violations of the Act occurred because the advertisements do not contain express
3 advocacy or its functional equivalent.

4 It appears that the radio and television ads at issue meet the definition of
5 "coordinated communications," but qualify for the safe harbor for candidate charitable
6 solicitations under 11 C.F.R. § 109.21(g) because: (1) the ads do not promote, support,
7 attack, or oppose ("PASO") Denham or any other Federal candidate(s); (2) RB, the
8 organization for which the funds were solicited, is a 501(c)(3) tax-exempt organization as
9 described at 11 C.F.R. § 300.65; and (3) the funds appeared to have been raised solely for
10 charitable purposes, *i.e.*, donations to RB, a 501(c)(3) organization to benefit the Gold
11 Star Project. Accordingly, the Commission found no reason to believe that Remembering
12 the Brave Foundation made a prohibited in-kind corporate contribution resulting from
13 coordinated communications in violation of 2 U.S.C. § 441b(a).

14 With regard to the allegations that the advertisements were electioneering
15 communications, the Commission was equally divided on whether to find reason to
16 believe that Remembering the Brave Foundation violated 2 U.S.C. §§ 434(f) and 441d,
17 by failing to file disclosure reports for these communications and failing to include
18 proper disclaimers on the communications. The Commission will issue one or more
19 Statements of Reasons setting forth the basis for its decision regarding these allegations.

20

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Factual Background**

3 In 2010, Jeff Denham was both a California State Senator, representing the 12th
4 District, and a candidate for the U.S. House of Representatives for California's 19th
5 Congressional District. Denham did not run for re-election to the State Senate. Denham
6 won the June 8, 2010, Republican primary and the November 2, 2010, general election.

7 In the two months before the June 8 primary, Denham's State Committee made
8 transfers totaling \$225,000 to RB, an entity organized under Section 501(c)(3) of the
9 Internal Revenue Code (26 U.S.C. § 501(c)(3)). RB honors veterans killed in action, and
10 it organizes ceremonies and events to honor deceased servicemembers and their families.
11 See <http://www.rememberingthebrave.org/>. The transfers included a \$25,000 donation
12 made on April 12, 2010, and three loans, which the Committee forgave: a \$100,000 loan
13 made on April 19, 2010, a \$50,000 loan made on May 12, 2010, and a \$50,000 loan on
14 May 25, 2010.¹

15 Eleven days before the June 8 primary, a benefit concert was held at the
16 Chukchansi Gold Resort & Casino, in Coarsegold, California, which is in the 19th
17 Congressional District. The concert, sponsored by RB and featuring country and western
18 music performer Phil Vassar, was advertised on radio, television, and the internet as a
19 benefit concert to raise donations for Project Gold Star—a program administered by the
20 California Department of Veteran Affairs to raise private donations to pay the costs of a
21 specialized license plate program for the families of U.S. military personnel killed while
22 serving on active duty. Several of the advertisements promoting the concert featured

¹ See <http://cal-access.sos.ca.gov/PDFGen/pdfgen.prg?filingid=1521503&amendid=0> and <http://cal-access.sos.ca.gov/PDFGen/pdfgen.prg?filingid=1568057&amendid=0>.

1 Denham. RB asked Denham to act as spokesperson and to appear in the ads because of
2 his "long-standing association with veterans' issues and the Gold Star Project
3 legislation." Response at 2. Denham, an Air Force veteran, was Chairman of the
4 Veterans' Affairs Committee while he was a California State Senator and was a coauthor
5 of Senate Bill 1455, the California Gold Star Family License Plate bill. Project Gold Star
6 was signed into law in September 2008.

7 Complainant in MUR 6289 provided a "Transcript of Coordinated Ads," which
8 contains a link to the television ad as posted on the internet at
9 <http://www.rememberthebrave.com/>, a transcript of the radio ad, and a list of seven TV
10 and radio stations that aired the ads. The ads aired in May 2010, up to the date of the
11 event.

12 **TRANSCRIPT OF RADIO AD:**

13 **ANNOUNCER:** Join country superstar Phil Vassar for a one-night
14 Remember the Brave benefit concert, Friday May 28th Memorial weekend
15 at Chukchansi Gold Resort and Casino. Veteran Affairs Committee
16 Chairman Senator Jeff Denham.

17
18 **JEFF DENHAM:** As a veteran, I know the sacrifices of our servicemen
19 and women, and the sacrifice shared by their loved ones who pray for their
20 safe return. But some of them don't make it, their families then become
21 Gold Star families. This event will raise funds for Gold Star families and
22 the Gold Star project as recognition for their ultimate sacrifice. Please
23 join us at our benefit concert on May 28th Memorial weekend. If you can't
24 make it, go to Remember the Brave dot com to learn more and to make
25 your tax-deductible donations. Remember, every dollar counts.

26
27 I'm Senator Jeff Denham.

28
29 **ANNOUNCER:** Join Phil Vassar and Jeff Denham at the Remember the
30 Brave benefit concert. For tickets go to Chukchansi Gold Resort and
31 Casino or visit Ticketmaster dot com.
32

TRANSCRIPT OF TELEVISION AD (as posted on the internet) :

<http://www.rememberthebrave.com/>

PAGE 1: At top of page is the logo of Remembering the Brave, followed by Benefit Concert. Underneath it is "Phil Vassar" followed by the date (May 28th) and location of the event (Chukchansi Gold Resort & Casino), a photo of a sample specialized license plate next to a statement: "Proceeds benefit the California Department of Veteran Affairs Project Gold Star, a link to the California Department of Veteran Affairs website, and two buttons: "Buy Tickets" and "Donate."

PAGE 2: (Video)(30 seconds):

- **First clip:** Phil Vassar live concert and a voiceover "Join country superstar Phil Vassar for a one night benefit concert" while the following words flash on the screen "Remember the Brave" "Chukchansi Gold Resort and Casino" and "May 28th".
- **Second clip:** Denham with 3 other individuals, two of whom appear to be veterans. Denham is standing in the middle of the group while the words "Senator Jeff Denham, Chairman, Veterans Affairs" flash on the screen. Denham then says "As a veteran, I know the sacrifices of our service men and women. A sacrifice shared by their loved ones who pray for their safe return. But some don't make it. Their families then become Gold Star Families."
- **Third clip:** Phil Vassar concert and a voiceover "Join Phil Vassar at the Remember the Brave benefit concert. Visit Ticketmaster dot com for your tickets today" while the words "May 28th" "Chukchansi Gold Resort and Casino" and "Ticketmaster.com" flash on the screen.
- **Fourth clip:** same shot of Denham with the veterans and Denham saying "If you can't make it, go to Rememberthebrave.com to learn more" while the words "Rememberthebrave.com" flash on the screen.

TRANSCRIPT OF INTERNET AD:

- **Left side of screen:** Photo of Denham and the words "State Senator Jeff Denham, Veterans' Affairs Committee" under the photo.
- **Right Side of screen:** Message "As a veteran, I know the sacrifices of our service men and women. A sacrifice shared by their loved ones who pray for their safe return. But some don't make it. Their families then become Gold Star Families. We're raising funds to make available commemorative license plates for these families as recognition for their sacrifice. Please join us at our benefit concert on May 28th. If you can't attend, I urge you to learn more [link] about these families and make a tax-deductible contribution [link]. Remember, every dollar counts. Learn

1 More: California Department of Veteran Affairs – Project Gold Star
2 [link].

- 3 • **Bottom of screen:** rememberthebrave.com is a project of Remembering
4 The Brave Foundation, a 501(c)(3) not-for-profit organization. For more
5 information, please visit www.RememberingTheBrave.org. Contributions
6 and donations are tax deductible and directly benefit the Remembering the
7 Brave Foundation.
8

9 RB sponsored the benefit concert, the proceeds of which were donated to Project
10 Gold Star. Response at 2. RB also stated that it, not the Tribe, produced, aired, and paid
11 for the radio, television, and internet ads. *Id.* Documentation submitted with the
12 complaint in MUR 6362 indicates that GBA and Alamance Advisors handled the media
13 buy for the concert on behalf of its client, RB. *See* Emails between Genet Slagle (media
14 buyer with GBA) to Matt Rosenfeld (President/General Manager for KSEE-NBC24,
15 KSEE Weather Plus, and LATV la alternativo), dated April 29, 2010, regarding Gold
16 Star Families Proposal. It also appears that GBA and Alamance Advisors handled the
17 media buys for the Denham for Congress campaign in 2010.² *See* Emails from Genet
18 Slagle to Donald Osika, dated January 29, 2010. The response did not specify how much
19 was spent on the ads, but does not dispute the \$100,000-\$200,000 amount mentioned in
20 the complaint. It appears that RB raised a total of \$105,440.24, about a third of the total
21 amount raised (\$300,000) for Project Gold Star.³

² The Denham Federal Committee's 2010 April Quarterly Report reflects disbursements to GBA and to Alamance for broadcast advertising.

³ The California Department of Veteran Affairs announced that Project Gold Star had met its fundraising goal. *See* <http://www.cdva.ca.gov/newhome.aspx>. RB posted a letter from the Department of Veteran Affairs thanking it for its \$105,440.24 donation in support of Project Gold Star. *See* <http://www.rememberingthebrave.org/news/>. On the letter is a handwritten note, indicating that this was the single largest donation received. *Id.* In a news release announcing that the Gold Star Project had raised \$300,000 and that the Gold Star plate initiative had passed, RB acknowledges that it "together with Senator Denham, his supporters, and other contributors ... raised approximately one-third of the funds needed to get the license plate initiative passed." *Id.*

1 RB acknowledged that the ads aired during May 2010, up until the May 28th date
2 of the benefit concert, which was within thirty (30) days of the California Congressional
3 primary election in which Denham appeared as a candidate. *Id.* at 4. However, the
4 response argued the concert was scheduled for May 28th because it was close to
5 Memorial Day, an appropriate date on which to hold an event related to veteran/military
6 issues and causes, and not because May 28 was close to the primary. *Id.* at 6. The
7 response also stated that the ads aired over a geographic area around the Casino where
8 the concert was held and included Denham's State Senate district, the 19th Congressional
9 District, and areas beyond. *Id.* at 4. Finally, the response acknowledged that the ads
10 could be received by more than 50,000 people within the 19th Congressional District. *Id.*

11 **B. Coordinated Communications**

12
13 The Act subjects contributions and expenditures to certain restrictions,
14 limitations, and reporting requirements. *See generally* 2 U.S.C. §§ 441a, 434b.
15 Contributions can be monetary or "in-kind." In-kind contributions include an
16 expenditure made by any person "in cooperation, consultation, or concert, with, or at the
17 request or suggestion of, a candidate, his authorized political committees, or their
18 agents," and are subject to the same restrictions and reporting requirements as other
19 contributions. 2 U.S.C. § 441a(a)(7)(A) and (B)(i); 11 C.F.R. §§ 100.52(d)(1), 109.21(b).
20 The Commission's regulations at 11 C.F.R. § 109.21 provide that coordinated
21 communications constitute in-kind contributions from the party paying for such
22 communications to the candidate, the candidate's authorized committee, or the political
23 party committee which coordinates the communication. A corporation is prohibited from
24 making any contribution in connection with a Federal election. 2 U.S.C. § 441b(a).

1 A communication is coordinated if it is paid for by someone other than the
2 candidate or the candidate's authorized committee (or the political party committee,
3 where applicable); it satisfies one or more content standards; and it satisfies one or more
4 conduct standards. All three prongs must be met for a communication to be considered
5 coordinated. 11 C.F.R. § 109.21. The Commission's regulations exempt from the
6 definition of "coordinated communication" a public communication in which a Federal
7 candidate solicits funds for organizations as permitted by 11 C.F.R. § 300.65, provided
8 that the public communication does not PASO the soliciting candidate or that candidate's
9 opponent(s) in the election. See 11 C.F.R. § 109.21(g)(2). Federal candidates and
10 officeholders may solicit funds for tax-exempt organizations as described in 26 U.S.C.
11 § 501(c). 11 C.F.R. § 300.65.

12 The radio and television ads at issue meet all three prongs of the coordination test.
13 The payment prong is satisfied because there is information that the ads were paid for by
14 RB, someone other than the candidate, his authorized committee, or political party
15 committee. 11 C.F.R. § 109.21(a)(1). The content prong is satisfied because the
16 communications qualify as public communications which "refer[] to a clearly identified
17 House or Senate candidate that [are] publicly distributed or otherwise publicly
18 disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the
19 ...primary or preference election."⁴ 11 C.F.R. § 109.21(c)(4)(i). The content prong is also
20 satisfied because the ads meet the definition of electioneering communications. 11 C.F.R.
21 § 109.21(c)(1). The ads are electioneering communications because they were publicly

⁴ A public communication includes broadcast communications. 2 U.S.C. § 431(22). It does not include internet communications, except for communications placed for a fee on another's Web site. 11 C.F.R. § 100.26. "Clearly identified" means the candidate's name or photograph appears, or "the identity of the candidate is otherwise apparent through an unambiguous reference." 2 U.S.C. § 431(18); 11 C.F.R. § 100.17.

1 distributed on radio and television, refer to a clearly identified candidate for Federal
2 office, were publicly distributed within 30 days before the primary election, and were
3 targeted to the relevant electorate (the ads could be received by 50,000 or more persons in
4 the district that Denham sought to represent (19th Congressional District)).⁵ 11 C.F.R.
5 § 100.29.

6 The conduct prong is satisfied if a candidate or candidate's committee assents to a
7 request or suggestion that the public communication be created, produced, or distributed,
8 and that request or suggestion came from the person paying for the communication.

9 11 C.F.R. § 109.21(d)(1)(ii). The response acknowledged that RB requested that
10 Denham act as the spokesperson and to appear in the ads, which he did. Response at 2.
11 Because Denham is an agent of his Committee, his actions are also imputed to his
12 Committee. 11 C.F.R. §§ 109.3(b)(1) and (2); 109.21(a), (d)(1)(ii).

13 Though the television and radio ads meet the definition of "coordinated
14 communications," they qualify for the safe harbor for candidate charitable solicitations in
15 11 C.F.R. § 109.21(g)(2). This provision exempts from the definition of "coordinated
16 communications" public communications in which a Federal candidate solicits funds for
17 certain tax-exempt organizations as permitted by 11 C.F.R. § 300.65, provided that the
18 public communications do not PASO the soliciting candidate or that candidate's
19 opponents in that election. In this matter, Denham, a Federal candidate, appeared and/or
20 spoke in broadcast radio and television ads to solicit funds for RB, a 501(c)(3)
21 organization, in support of Project Gold Star. The available information indicates that
22 RB is an organization described in 11 C.F.R. § 300.65, and the solicitations for donations

⁵ RB's internet ads are not included in this analysis because they are exempt from the definition of electioneering communications. 11 C.F.R. § 100.29(c)(1).

1 to RB complied with the requirements of 11 C.F.R. § 300.65 because they appeared to
2 have been for the purpose of raising funds for RB in support of Project Gold Star. Thus,
3 it appears that these communications are exempt from the definition of “coordinated
4 communications” if they did not promote or support Denham and did not attack or
5 oppose his opponent.

6 It does not appear that the ads at issue promote or support Denham or attack or
7 oppose any of his opponents. Although the Commission has not defined the term
8 “promote, support, attack, or oppose,” it has provided some guidance in advisory
9 opinions as to what might constitute PASO of a candidate. See AO 2009-26 (Coulson)
10 (concluding that a state officeholder could use non-federal funds to pay for
11 communication that did not PASO a candidate for Federal office because the
12 communication was solely part of the State officeholder’s duties, did not solicit
13 donations, nor did it expressly advocate the candidate’s election or the defeat of her
14 opponents); see also AOs 2007-34 (Jackson), 2007-21 (Holt), 2006-10 (Echostar) and
15 2003-25 (Weinzapfel) (holding that the mere identification of an individual who is a
16 Federal candidate does not, in itself, promote, support, attack or oppose that candidate).

17 The only clearly identified candidate in the ads is Denham, who is identified as a
18 veteran, a State Senator, and as Chairman of the Veterans’ Affairs Committee, not as a
19 candidate for Federal office. The ads do not contain express advocacy or its functional
20 equivalent, and do not contain references to any election or political party. Given the
21 above, it does not appear that the ads PASO’d Denham or any of his opponents.

22 Neither the timing of the benefit concert nor the involvement of the Denham
23 campaign consultants/media buyer/supporters in the planning of the benefit concert and

1 ads would appear to prevent the application of the safe harbor for charitable solicitations.
2 *See* Explanation and Justification for Final Rules for Safe Harbor for Endorsements and
3 Solicitations by Federal Candidates (11 C.F.R. § 109.21(g)) 71 Fed. Reg. 33201-33202
4 (Jun. 8, 2006) (stating that the “safe harbor applies regardless of the timing and proximity
5 to an election ... of the solicitation and [w]hen the safe harbor is applicable, the . . .
6 soliciting candidate (and the candidate’s agents) may be involved in the development of
7 the communication, in determining the content of the communication, as well as
8 determining the means or mode and timing or frequency of the communication.”); *See*
9 *also*, AO 2006-10 (Echostar).

10 Based on the above, the ads at issue were not coordinated communications.
11 Accordingly, the Commission found no reason to believe that Remembering the Brave
12 Foundation made a prohibited in-kind corporate contribution resulting from coordinated
13 communications in violation of 2 U.S.C. § 441b(a).